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10/553,363

10/14/2005

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9080

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EXAMINER

PRYOR, ALTON NATHANIEL

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/553,363  
Filing Date: October 14, 2005  
Appellant(s): LATORSE ET AL.

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Paul Grandinetti  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 5/10/10 appealing from the Office action  
mailed 8/24/09.

**(1) Real Party in Interest**

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The following is a list of claims that are rejected and pending in the application:

Claims 1, 15-17, 21-23 are rejected. Claims 2-14 and 18 through 20 have been canceled.

**(4) Status of Amendments After Final**

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

**(5) Summary of Claimed Subject Matter**

The examiner has no comment on the summary of claimed subject matter contained in the brief.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being

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maintained by the examiner except for the grounds of rejection (if any) listed under the subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

**(7) Claims Appendix**

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

**(8) Evidence Relied Upon**

WO03/079788

Foor et al.

10-2003

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 102***

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Claims 1,15-17 are rejected under 35 U.S.C. 102(e) as being anticipated by Foor et al. (WO 03/079788; 10/2/03). Foor et al. teach a fungicidal composition comprising

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fluopicolide and chlorothanil (page 44 lines 7 - 11, page 50 Table A Compd No. 1). Floor et al. teach that to the composition can be added diluents and surfactants (page 44 lines 33-35). Floor et al. teach a method of applying the composition to vegetable and fruit crop in order to control fungi growth (page 48 line 29 - page 49 line 22).

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 21-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Floor et al. as applied to claims 1, 15-17 above. Floor et al. teaches all that is recited in claims 21-23 except for fluopicolide to chlorothalonil in a ratio of from 1:20 to 1:2. Note, Floor et al. teaches the combination of fluopicolide with chlorothalonil which makes all ratios of fluopicolide to chlorothalonil obvious in the absence of unexpected results. The specification provides data for the combination of fluopicolide to chlorothalonil in a ratio range of 1:20 to 1:1 other than at the ratio of 1:1.

### **(10) Response to Argument**

With respect to the 102 rejection, Appellants acknowledge that Floor et al. disclose the combination of fluopicolide to chlorothalonil. However, the Appellants argue that Floor et al. do not teach the narrow and specifically defined ratios of fluopicolide to chlorothalonil as recited in the claims. Note the claims recite fluopicolide to chlorothalonil in a ratio of from 1:20 to 1:1. The Examiner argues that Floor et al. at

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page 44 line 10 teach the combination of fluopicolide and chlorothalonil. Without any statement regarding ratios in Foor et al., this teaching reads on the claimed 1:1 ratio of fluopicolide to chlorothalonil claimed. Results presented using the Colby formula will not overcome this 102 rejection since Foor et al. teach a composition comprising fluopicolide and chlorothalonil in a ratio of 1:1.

With respect to the 103 rejection, Appellants' data appears to be unexpected for ratios of fluopicolide to chlorothalonil other than 1:1. However, the Appellants do not provide data for fluopicolide to chlorothalonil external to the scope of the claimed ratio range of 1:20 to 1:1 to show that expected results would be obtained.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Alton N. Pryor/

Primary Examiner, Art Unit 1616

Conferees:

/Johann R. Richter/

Supervisory Patent Examiner, Art Unit 1616

/SREENI PADMANABHAN/

Supervisory Patent Examiner, Art Unit 1627

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